Specifically, on January 21, 2003 Respondent's counsel testified before the late Honorable Wilkie D. Ferguson (District Court) that "case load printouts" essential for the Court to make a "comparison of case load totals" prior to granting partial summary judgment on April 8, 2004 (R-170), were "unavailable." This statement was not true and contradicted the statement of witness Donald Monroe on September 24, 2003, in the simultaneous case which at the time was pending before the 4th District court of appeals, Mr. Monroe, in the state Court proceeding, stated under oath, " case load printouts were due from the Specialist by the 10th of each month" to him.

Having full knowledge that the District Court would require this evidence to make the case load comparisons in summary judgment, the Respondent withheld this evidence. In it's ruling the District Court subsequently stated in it's order on summary judgment on April 4, 2004:

" Moreover, Plaintiff testified that her responsibilities as a Specialist were similar to those of other Specialists, thus a comparison of case load totals during the relevant time period is necessary to any inference of adverse employment action."

A Direct and Concise Argument Amplifying The Reasons Relied On For Allowance of the Writ

The Petitioner, an African American female was employed as a Correctional Probation Specialist with the Respondent, Florida Department of Corrections, beginning on August 10th 1990. She had been employed by the Respondent for over thirteen (13) years. On February 15, 2002, the Petitioner filed a lawsuit against her employer alleging that she had been subjected to "retaliation" after engaged in statutorily protected activity. The complaint alleged that since filing her first complaint internally on February 11, 1997, against her immediate supervisors Tony Harper and Joyce Haley, she had been subjected to continued retaliatory actions by officials who reported to both regional administrators. The employee's first complaint of discrimination / retaliation outlined incidents in which she had been humiliated in staff meetings by Harper, been subjected to offensive language including the term "nigger" when Harper referred to his black supervisor, and his instructions to her co-workers to document her activities. At that time part of the employee's official duties were to conduct internal investigations involving Probation Officer and or employee misconduct. During

the course of her duties as Inspector for the Office of the Inspector General, the Petitioner became aware that Inspectors were omitting crucial portions of statements taken from employees and Officers under investigation. She reported these instances in her first internal complaint filed. A few days after filing this complaint, the Petitioner received a complaint from African American students in the academy for new Probation Officer recruits that they were offended by material which presented black males as "dummies." The Petitioner reported the incident to her superiors. She was then subjected to her first internal investigation (2-19-97). Upon review of a copy of the internal investigation conducted by DOC investigations regarding her first complaint, the employee immediately noticed that key portions of her statement and crucial evidence necessary to sustain her claims were omitted. The employee brought this to the attention of top agency officials, but her complaints were ignored. The Petitioner was then transferred and received her first disciplinary action - a written reprimand. The employee then filed her first charge with the U.S. Equal Employment Opportunity Commission on May 13, 1997. At that time. the EEOC relied upon the DOC to conduct an investigation and forward a copy of it's findings. With no independent review conducted by the

EEOC, they adopted the findings of the DOC " OIG's office which engaged in the very same practice of "omissions of fact." The Petitioner then filed a lawsuit on February 4, 1998. The District Court granted Summary Judgment in favor of the Respondent claiming that the alleged retaliation had occurred "too soon" and misinterpreted from the pleadings that the Petitioner alleged the retaliation had occurred "after" the EEOC charge of May 13, 1997 and not (accurately) after the internal complaint. The Petitioner appealed to the 11th Circuit Court of Appeals which affirmed this decision. A Petition for a Writ of Certiorari was denied by the U.S. Supreme Court. (2000).

The DOC then instituted an aggressive course of retaliatory action and harassment against the then still employed Simpson, which included threats to garnish her wages for attorneys' fees and scrutiny of her work. The Petitioner continued to write letters to the agency head, and top officials requesting intervention. Her requests remained ignored. In 1998, the Respondent subjected the Petitioner to her second internal investigation, this time fraudulently alleging that the Petitioner had become aware of another employee's pending discipline "illegally." In June 2000, DOC officials searched the Petitioner's office and destroyed her property with the logo of the "NAACP."

The Petitioner complained to her immediate supervisor Dave North, but no action was taken or investigation conducted. In March 2001, the second Correctional Probation Specialist in the equivalent position to the employee, was granted a transfer to an office in the County of West Palm Beach, FL.DOC officials then made several excuses as to why the position was never filled for over one year. The Petitioner was subsequently overburdened with work as a result. In April 2001, the Respondent promoted Senior Officer Steve Weisberg to a Correctional Probation Specialist position at another office while he worked in the employee's office. Even though the Correctional Probation Specialist position was still vacant at the employee's office, DOC officials immediately reassigned him to another office in which there were already two correctional Probation Specialists assigned and working. When the employee inquired as to why she was the only Correctional Probation Specialist in Broward County Florida working alone, officials alluded to a non-existent policy which it claimed precluded the transfer of another officer. Every other office in Broward County 17-1,17-2,17A,17-4,17-5,17-7,17-8 had at least <u>two</u> Correctional Probation Specialist positions assigned and working. The only office in Broward County in which there was <u>one</u> Correctional Probation Specialist assigned and working

was the 17-3 office, Petitioner's assigned office. On April 20, 2001, after the reassignment of Weisberg from her office, the employee filed EEOC charge #2 with the U.S. Equal Employment Opportunity Commission alleging that she was subjected to a hostile work environment due to the destruction of her property, and intentionally overburdened with work by the DOC's refusal to fill the second position in her office. DOC officials then provided fraudulent reasons for failing to fill the position which included a sworn affidavit from the Broward Circuit Administrator Donald Monroe in which he attested to a " DOC policy and procedure for promotions" which precluded him from filling the position. When the Petitioner filed the only Policy and Procedure in existence which subsequently again contradicted his claims, it was overlooked by the Courts. As a result of the Respondent's actions or inactions, the employee subsequently worked an average of five hours extra each week to supervise the high risk violent career criminals, armed robbers and paroled murderer's assigned to her for supervision on conditional release or probation. Due to the fact that these offenders were repeat offenders with high recidivism rates, the contact standard requirements increased which included: drug testing, home visits, monthly meetings, violation reports, court hearings, parole/conditional release hearings at the jails, paperwork required for file audits

etc. The required timeframe for the submission of violation reports was five days. Due to the overwhelming increase in violation reports and paperwork, the employee completed paperwork at home to prevent being targeted for disciplinary action. During this timeframe, the employee was informed by her immediate supervisor Dave North in a staff meeting that overtime funds had been exhausted and no payments would be made for overtime worked. After speaking with coworkers in other offices, the employee believed that her office was the only office in which this claim was made. Believing that this was yet another attempt to sabotage her work efforts, the employee took files home for timely completion of warrants and investigations informing no one of this action. Had the employee informed her supervisor of her failure to complete a violation report and warrant within the five day period, disciplinary action would have been requested against her. The Petitioner then notified the Court in her pleadings (pro-se) that she had worked an average of five hours weekly during the yearlong timeframe that the DOC refused to fill the position. The agency then requested an investigation be conducted by the Office of the Inspector General - "OIG," the very same investigators whom the employee complained had omitted facts, evidence, and statements during investigations of employees and of which she had

"personal knowledge" as a former Inspector. This was now investigation #3, which was assigned to Inspector Paul Bowdre. Inspector Bowdre was known to have a reputation of being dishonest during investigations, and during the course of discovery, the employee had obtained his employment application for the position of "Inspector" and learned he had lied on his application. Prior to becoming an Inspector, Bowdre worked for the Town of Palm Beach as a Police Captain earning $53,000 each year. He claimed on his application that he left that position to "seek other opportunities." His next position was five months later earning $21,000 a year as a counselor. Bowdre then left this position to become a DOC Inspector for the "OIG" in 1995.It was later learned as a result of further investigation upon review of the glaring differences in salary that Bowdre was forced to resign or terminated from the Town of Palm Beach due to "misconduct." When the Petitioner reviewed the completed internal investigation conducted by Bowdre (in which she was again subject), the transcript of her statement included over "127" words of "inaudible" and "interrupted." These words appeared at times when the Petitioner began to outline detailed information alleging the continued harassment and retaliation against her by still Regional Administrators - Joyce Haley and Tony Harper. Once again, the Petitioner addressed this issue in detail via

memorandums and e-mail to DOC Secretary James Crosby, only to have the issue ignored. In the memorandums the employee informed Mr. Crosby of her background as a former Inspector and prior reports of misconduct by Inspectors by the very same actions. Secretary ignored her letters. In June 2003, the employee received a pre-determination letter and requested a hearing. The hearing was held before Assistant Secretary Tina Hayes. The employee once again outlined in detail (in the record before both the District Court and 4th District Court of Appeals) each and every incident since her very first complaint up until that point- in writing. On August 1, 2003, these incidents culminated with the termination of the Petitioner's employment. On August 4, 2003, the employee filed EEOC charge #3 with the U.S. Equal Employment Opportunity Commission. The Respondent filed it's motion for summary judgment in March 2003. The Petitioner filed her response and attached her affidavit outlining the five hours per week on average in overtime worked as stated. The Respondent misrepresented that the Petitioner claimed she worked the overtime hours to defeat it's motion for Summary Judgment. However, the reason why the Respondent was not aware of the actions taken by the employee to maintain the increased workload was simply because the Respondent failed to contact the employee to obtain her statement and forwarded

fraudulent findings to the EEOC that she had "imagined" retaliation. Due to the Respondent's own flawed investigative proceedings, it now blamed the employee for not previously making said claims. During post-hearing motions, the Petitioner notified the Court of her personal knowledge that another Correctional Probation Specialist by the name of Willie Jenkins had been arrested for Sexual Battery and Violation Of Injunction Against Domestic Violence, and had served a felony probation while still employed. She further reported in pleadings before the District Court that Jenkins had been discreetly assigned for supervision by administrators Haley and Harper, and has maintained his employment and law enforcement certification. The Appellate Court found that the issue was not before the Court at Summary Judgment. However the issue was before the Court during post-trial proceedings when the Petitioner filed a Motion to have her counsel removed from the case, after she filed a Motion To Alter/Amend the judgment on 6-14-04 after the Court granted the Respondent's Motion For Judgment As A Matter of Law. The Petitioner filed an appeal of her termination with PERC and the 4th District Court of Appeals which decided in favor of the Respondent. The 4th DCA ruling determined that the employee had been "apprised of the actions against her" in the notice which was not the central issue in the case. This Court has held in *Reeves v. Sanderson Plumbing Products., Inc. 120 S.Ct. 2097,*

210 (2000). "when deciding a motion for judgment as a matter of law under Title VII, a court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. " The standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same."id. In this case, the benefit of the doubt was weighed heavily in favor of the "moving party" contrary to this Court's decision in Reeves. To further exacerbate this instance, the Courts overlooked inconsistencies in statements by key witness Donald Monroe involving evidence required by the District Court Judge in deciding "Summary Judgment." In the District Court's order granting Summary Judgment the Court again ruled," "Moreover, Plaintiff testified that her responsibilities as a Specialist were similar to those of other Specialists, thus a comparison of case load totals during the relevant time period is necessary to any inference of adverse employment action." During the course of the Federal litigation, the Plaintiff exhausted every available remedy to obtain the case load printouts, only to have very effort deceptively thwarted by the Respondent when it willfully withheld these printouts. According to page 5 of the 11th Circuit Appellate Court's footnote, "DOC attested that no such documents were in it's possession. However, during the PERC proceeding, in the transcript of the

hearing (R-97) glaringly before the District Court and Appellate Courts, Broward Circuit Administrator Donald Monroe attested that the case load printouts were due to him "by the 10th of each month." The District Court subsequently adopted the findings of the PERC and 4th DCA, while overlooking testimony which contradicted the testimony presented to the late Honorable Wilkie D, Ferguson by DOC counsel during a hearing in which counsel falsely claimed the printouts were not available. In addition, during the post trial oral argument after filing the Rule 50 motion, the Respondent's counsel again claimed printouts were not available.(transcript of the oral argument was provided to the 11th Circuit). Essential to the Petitioner's claims was the necessity for the Court to review these case load printouts, and the Respondent willfully withheld this evidence to deceive the Court. The Respondent willfully sabotaged the Petitioner's attempts to engage in a fair and impartial proceeding, and as such infringed upon her rights to "due process" in violation of the 14th Amendment to the U.S. Constitution. The Respondent intentionally allowed the continuation of the retaliatory acts against the employee, by engaging in these deceptive tactics in order to prevail in the eyes of the Courts. According to the 11th Circuit opinion, the affidavit filed by Petitioner in which another employee, Campbell was informed of the administrators plan to fire Simpson, had no merit. In the affidavit. According to the affidavit:

"Campbell indicated that in an October 2000 telephone conversation with Stephanie Curd, an assistant attorney general for the State of Florida, Curd stated DOC administrators "hate(d)" Simpson for filing lawsuits and that these administrators said eventually they would fire Simpson. But Simpson was not fired until nearly three years after this conversation." This Court should review this Petitioners case to resolve the conflict between the Circuits involving the standard timeframe between the protected activity and the retaliatory action for the bringing of claims of retaliation under Title IV. In the Petitioner's previous claim disposed of by the District Court, 11th Circuit, and certiorari denied, the Courts held that the actions against this Petitioner were "too soon" to be retaliatory. In this case there was no "Simpson was not fired until nearly three years later." The previous claim was disposed of in 1999, and there were ongoing appeals until 2000. The new EEOC charge was filed on April 20, 2001 (protected activity), with the lawsuit filed again in February 15, 2002.(protected activity). The Petitioner continued to endure the retaliatory actions which were magnified after the Respondent continued to prevail in Court. She was then subsequently terminated on August 1, 2003. Beginning in the timeframe of 1997 to the ultimate culmination of the illegal action 2003, there was no break in the time span of the Petitioner's continued

engagement in "protected activity" as interpreted by the 11th Circuit. The 11th Circuit relied upon a perceived break in timeframe theory that did not occur in this case and did not apply here.

On July 29, 2004 (R-201) the employee filed a motion with the District Court to waive or reduce the cost of the transcript, after being informed a lump sum of over $1,000 was required up front by the Court Reporter. At that time the employee did not have the ability to produce $1,000 within the specified and prompt timeframe requested. The employee requested and attempted to make payment arrangements in which a portion would be paid at a time. The Court Reporter refused to make any such arrangements. The Court subsequently denied the Petitioner's motion to reduce to cost. The employee was left with no alternative but to proceed without the transcript. On May 19, 2005, the 11th Circuit affirmed the District Court's granting in part of Summary Judgment on 4-8-04 and Judgment As A Matter of Law on 5-13-04 in open court, signed on 6-2-04. The Court ruled that it could not review "whether the district court erred in granting the DOC's Rule 50, because the Petitioner (Simpson) did not provide the trial transcripts .In it's ruling, the Appellate Court referred to Loren v. Sasser, 309 F. 3d 1296, 1304 (11th cir. 2002) (writing that a pro se litigant

"must provide trial transcripts in the appellate record to enable this court to review challenges to sufficiency of the evidence")cert. denied, 123 S. Ct. 1589, 2219 (2003). On June 7, 2005, the Petitioner filed a Petition for Rehearing due to the change in her financial status and ability to pay "up front" the required over $1,000 quoted by the Court Reporter required for the production of the trial transcript. The 5th Circuit has held that the failure of an appellant to provide a trial transcript is grounds for dismissal of the appeal notwithstanding "inability to pay for it." Richardson v. Henry 902 F.2d 414,415-16 (5th Cir. 1990).

In Simpson's case she did not have the ability to pay the "lump sum" amount immediately required. Had the cost been reduced, or she be permitted to make payments in increments established by the Court, her case could have been reviewed by the appellate court. In addition, the Petitioner indicated in her Petition For Rehearing that she now had the ability to pay for said transcript, however the Court denied her Petition on August 17, 2005. At issue is whether or not a pro-se litigant should be permitted to make payment arrangements for trial transcripts so his or her case can be reviewed by the appellate courts?

The District and Appellate Courts disposed of the Petitioner's case while overlooking the fact that the

DOC withheld and or misrepresented the availability of "key evidence." Furthermore, the Petitioner was not permitted to obtain the necessary transcripts for review when during the course of the appeal, she had the ability to pay for same.

Also at issue is whether or not state Correctional Probation Officers are "Constitutional Officers" as defined by the Florida Constitution, have abused the judicial process by concealing their illegal acts and misleading the Courts.

Wherefore, the Petitioner respectfully prays that this Court grant a Petition For Writ of Certiorari to review this matter accordingly.

APPENDIX

Appendix

Report and Recommendation of the U.S. District Court Magistrate, dated August 20, 2003 — Pages 1-16

U.S. District Court Order Adopting Report And Recommendation dated September 10, 2003 — Pages 17-18

U.S. District Court Order Denying Motion For Summary Judgment Dated, September 15, 2003 — Pages 19-25

11th Circuit Court of Appeals Opinion, dated May 19, 2005 — Pages 26-35

11th Circuit Court of Appeals Order Denying Petition For Rehearing/ Rehearing En Banc, dated August 17, 2005 — Page 36-37

4th District Court of Appeal- State of Florida Opinion, dated December 29, 2004 — Pages 38-49

Florida Supreme Court Order Denying Petition To Invoke Discretionary Review, dated September 22, 2005 — Page 50-51

UNITED STATES DISTRICT COURT
SOUTHERN DDISTRICT OF FLORIDA

Case no. 02-60236-Civ-Zloch/Snow

FAYE WRIGHT SIMPSON

Plaintiff, **AUG 20 2003**

vs.

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

Defendant,

REORT AND RECOMMENDATION

This cause is before the Court on the Defendant's motion for Summary Judgment (Docket Entry 51), which was referred to United States Magistrate Judge Lurana S. Snow for report and recommendation.

PROCEDURAL HISTORY

The pro se complaint was filed February 15, 2002, alleging violation of the plaintiff's civil rights protected by 42 U.S.C. § § 1981, 1983 and by 42 U.S.C. § 2000 et seq. ("Title VII"). The one-count complaint alleged that the defendant retaliated against the plaintiff, who worked as a correctional probation specialist handling high risk cases, after she filed a 1997 complaint of

racial discrimination with the Equal Employment Opportunity Commission ("EEOC").

The defendant filed a motion to dismiss. After the undersigned issued a report and recommendation to grant the motion to dismiss the complaint, the plaintiff filed and amended complaint alleging a single count of retaliation in violation of Title VII.[1] The Court denied the motion to dismiss the amended complaint, but limited the alleged incidents of retaliation to those involving increased workload.

The defendant filed the instant motion for summary judgment, which is fully briefed and is ripe for consideration. It contends that the plaintiff cannot demonstrate several elements of a claim of retaliation. Pursuant to motions filed by the parties, the Court has stricken or limited consideration of several of the affidavits offered by the parties. (DE 104).

1 The amended complaint alleged retaliation in seven forms; the defendant (1) forced the plaintiff to perform overwhelming and overburdening work assignments; (2) transferred a correctional probation specialist from the office where the plaintiff worked and failed to fill the vacancy, causing excessive work for her;(3) continued to ignore the plaintiff's complaints of retaliation; (4) failed to properly investigate the plaintiff's EEOC charge of retaliation; (5 & 6) { alleged as one item } tolerated harassment and a hostile work environment by searching her office and breaking her NAACP pen after the NAACP forwarded letters of complaint to the defendant, and (7) subjected her to an unwarranted internal investigation by soliciting complaints from co-workers.

FACTS NOT IN DISPUTE

1. At the time of the incidents alleged in the complaint, the plaintiff worked for the defendant as a Correctional Probation Specialist in the Lauderdale Lakes, where she handled high risk cases (DE 56, plaintiff's deposition, pp. 34, 40, 94)

2. In May 1997, she filed an EEOC charge against the defendant alleging racial discrimination and retaliation related to her April 1997 transfer to the Hollywood office. Case No. 98-6133-Civ-Hurley. The case was resolved by summary judgment for the defendant, with attorney's fees taxed to the plaintiff. Both decisions were upheld by the Eleventh Circuit Court of Appeals in March and August 2000.

3. In early March 2001, John Permenter who worked with the plaintiff and held the same job as the plaintiff handling high risk cases, was transferred at his request to West Palm Beach. (DE 56 at 92-93)

4. In early April 2001, Steve Weisberg was promoted from the position of Correctional Probation Senior Officer to the position of Correctional Probation

Specialist. (Id at 99-100). He held that position in the plaintiff's office for a day or two, then was reassigned to a different office, leaving the plaintiff as the only person handling high risk cases in her office. (Id. at 102) the plaintiff testified that her workload did not increase based on Steve Weisberg's promotion, since his pre-promotion caseload was different from hers; her increased workload came from the unfilled position vacated by Mr. Permenter. (Id. At 152-53).

5. On April 20, 2001, the plaintiff filed a second EEOC charge alleging retaliation in violation of title VII.

6. The plaintiff was transferred to the Fort Lauderdale office in September or October 2002, after the office in Lauderdale Lakes closed. (Id. at 40)

III. RECOMMENDATION OF LAW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. P. 56c); Celotex Corp. v. Catrett, 477 u.s. 317, 322, 106 s. Ct. 2548, 2552 (1986). The evidence must be viewed in the light most favorable to the non-moving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

In opposition to a motion for summary judgment, a party must produce more than a scintilla of evidence on his behalf; he must produce sufficient evidence upon which a reasonable jury could find for him. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986).

A. Retaliation

The burden of proof in Title VII retaliation cases is governed by the framework established in McDonnell Douglas v. Green.

The substantive law of this circuit dictates that a plaintiff alleging retaliation must establish a prima facie case by showing; (1) a statutorily protected expression; (2) an adverse employment action, and (3) a causal link between the protected expression and the adverse action. Once a plaintiff has established a prima facie case of retaliation, the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment action. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted."

Hairston v. Gainesville Sun Publishing Co., 9 F. 3d 913, 919 (11th Cir. 1993)(citations omitted). The defendant contends that the plaintiff cannot make a prima facie case of any of the elements of retaliation.

1. Protected Activity

The defendant contends that the plaintiff's 1997 EEOC charge was not a protected activity because she cannot show that it was filed in good faith as required by Title VII. Little v. United Technologies, 103 F. 3d 956 (11 Cir 1997 ((an EEOC charge of a co-worker's discrimination, of which the employer was not aware, does not constitute statutorily-protected opposition to an unlawful employment practice). The defendant notes that the district court found her claim of disparate treatment as " being almost totally unsupported by evidence in the record ...." (Case 98-6133-Civ-Hurley, DE 124, p. 10) The defendant also asserts that the frivolousness of the prior litigation is confirmed by the award of attorney's fees to the defendant.

The plaintiff points out that the Eleventh Circuit Court of Appeals, reversing the trial court in part, found that plaintiff had proved a prima facie case of retaliation, but failed to show pretext in the defendant's

explanation for the reprimand she received. (Id., DE 178, p. 3)

The undersigned notes that in spite of the appellate opinion holding that the plaintiff had made a prima facie case of retaliation, the Eleventh Circuit Court of Appeals upheld the award of attorney's fees against Simpson for failing to substantiate her claims. The appellate court found that the award of fees to the defendant constituted " no misapplication of the law to the salient facts." (Id., DE 181, p. 2-3) However, construing the evidence in favor of the plaintiff, the undersigned finds that the plaintiff's ability to establish a prima facie case established that the first EEOC complaint constituted protected activity.

2. Adverse Employment Action

The amended complaint alleges two instances of retaliation. The plaintiff alleges she had an overwhelming caseload because a vacant correctional probation specialist position in her office was not filled. Subsequently a correctional probation specialist was promoted to fill that position, but immediately was transferred to another office, leaving the plaintiff with the increased workload. The undersigned finds that both of these allegations stand for proposition that the unfilled vacancy in the correctional probation specialist position substantially increased the plaintiff's workload.

The defendant notes that the undersigned found, in the recommendation on the motion to dismiss the amended complaint, that the allegations of an increased workload might constitute an adverse employment action. Gupta v. Florida Board of Regents, 212 f. 3d 571, 588 (11th Cir 2000) cert. denied, 531 U.S. 1076 (2001)(requiring a professor to teach three classes when the normal assignment was two classes might constitute an adverse employment action because it changed the terms and conditions of the plaintiff's employment). However, the defendant contends that the plaintiff has failed to show that she was required to work any additional hours or suffered a loss of pay.

The defendant offers the affidavit of Mr. Donald Monroe, Deputy Circuit Administrator who became the Circuit Administrator in May 2001. He avers that the plaintiff's workload was not abnormally larger than her counterparts' and that he reassigned part of her work to another office to prevent the plaintiff from being adversely affected by the personnel changes. (DE 54,¶ 9 and 10).

In response the plaintiff provides her affidavit which states that she "had to work an average of five hours per week extra in overtime without pay to properly supervise this caseload to prevent from being reprimanded, suspended or terminated by the

Defendant." (DE 65 ¶ 20). [2] She testified that she spoke to her circuit administrator, who may have been Donald Moore, complaining of the increased workload, but did not receive any response (DE 56, pp. 119-120). She also testified that she had documents reflecting the increased workload, but had given them to the EEOC and had not produced them for the defendant. (Id pp. 136-139) [3]

The defendant's reply includes the affidavit of Mr. John Edwards, who was the Circuit Administrator for Broward County from July 1, 2000, to May 31, 2001, when his Deputy Circuit Administrator, Donald Monroe, was promoted to Broward county Circuit Administrator. He states that he and Mr. Monroe instituted various transfers and reassignments of cases to prevent any increase in the plaintiff's workload. (DE 74, ¶ 4)

The defendant also provides the rebuttal affidavit of Donald Monroe, who states that he reviewed the plaintiff's time sheets from March 2001 to June 2002, and found none of them reflect any overtime work;

2 She also provided the rebuttal affidavit of Donald Campbell (DE 66), which contained the statement that Ms, Simpson told him that she was overburdened with work in 2001. Since this is inadmissible hearsay, the Court cannot consider it.

3 Nor has the plaintiff produced any such documentation to the Court.

Each time sheet is signed by the plaintiff to certify that the information contained therein is true and correct. (DE 75,¶ 30) Mr. Monroe also avers that he made a great effort to see that the plaintiff's workload did not increase as a result of Mr. Permenter's transfer. (Id.¶ 4) He provides a copy of his March 2, 2001, plan to split Mr. Permenter's 70 -case high risk load. At that time, the plaintiff had 67 high risk cases. (Id. Exhibit B). When Mr. Dave Coons returned frim leave in April 2002, he was assigned to the plaintiff's office to handle high-risk cases, (DE 54 ¶ 8) In the months following Mr. Permenter's transfer, the plaintiff's case load was 70 on April 2, 2001 on May 1, 65 on July 1, 64 on August 1, 70 on September 1, 60 on October, 65 in December, 67 on January 1, 2002 67 in February, 68 in March 1, 51 on April 1 and 67 on June 1. (DE 75, Exhibit B).

Examining the evidence in the light more favorable to the plaintiff, the undersigned finds that other than her affidavit that she worked an extra five hours per week, the plaintiff has not provided any evidence that she experienced an increased workload as a result of the transfer of Mr. Permenter. Her statement of overtime hours in the affidavit is not corroborated by the her signed time records. The monthly caseload

summaries clearly demonstrate that the plaintiff's case load did not increase from march 2, 2001, to June 2002. Accordingly, the plaintiff has not shown that she suffered an adverse employment action.[4]

3. Causation

The defendant argues that the allegations in the April 2001 EEOC charge are temporally too distant from the June 1997 EEOC charge to support a finding of retaliation. Parkins v. Civil Constructors of Illinois, Inc., 163 F. 3d 1027 (7th Cir. 1998) (several months is too distant to establish causation); Richmond v. ONEOK, Inc. 120 F. 3d 205, 209 (10th Cir. 1997)(three months too long); Sweeney v. West, 149 F. 3d 550, 557 (7th cir. 1998) (three years). The undersigned agrees that the plaintiff cannot establish causation based on mere temporal considerations; the time period between the 1997 EEOC charge and the challenged personnel actions in 2001 is too long to support an inference of causation.

4 The plaintiff argues disparate treatment; averring that hers was the only office in the county with only one high-risk specialist. This argument fails on two counts. The complaint does not allege a separate claim of disparate treatment, and the issue cannot be raised at this stage of the proceedings. Second, the plaintiff has offered no evidence that any comparable employee was treated more favorably. Mitchell v. Toledo Hospital, 964 F. 2d 577, 583 (6th Cir 1992) affd. 964 F. 2d 577 (6th Cir 1992).

The plaintiff's response asserts that she need show only that the person who took the adverse action knew of the protected activities when he acted. Goldsmith v. City of Atmore, 996 F. 2d 1155, 1163 (11th Cir. 1993). Donald Monroe testified that he was aware that the plaintiff had filed a charge of discrimination against the Department of Corrections. (DE 63 Exhibit C)

The Court notes that the plaintiff failed to comply with Local Rule 7.5.C.2, which requires each party to file relevant depositions with the court. Ms. Simpson has filed only one page of Mr. Monroe's deposition, from which it is impossible to determine whether the question dealt with the first or second EEOC complaint and completely fails to provide any insight about when Mr. Monroe became aware of whichever EEOC complaint referred to in question. Even viewing this evidence in the light most favorable to Ms. Simpson, the Court cannot say that Mr. Monroe's deposition proves that he was aware of the first EEOC charge when the vents of March and April 2001 took place.

The plaintiff also refers to Mr. Monroe's affidavit which states that he did not consider the plaintiff's

"EEOC complaints or any other protected activity" when making the challenged personnel decisions (DE 63, Exhibit F, ¶ 14). The plaintiff contends that the Court can infer from this statement that Mr. Monroe knew of the first EEOC charge while making personnel decisions. Viewing the evidence in the light most favorable to the plaintiff, the Court finds that the plaintiff has established causation by showing that Mr. Monroe knew that Ms. Simpson had filed the first EEOC complaint at the time he made the challenged personnel decisions.

4) Pretext

Mr. Monroe's affidavit states that he left the position vacated by Mr. Permenter open because budget concerns required him to keep Mr. Dave Coons, who would have filled Mr. Permenter's position, at his own position covering the sex offender cases he had been handling. Mr. Monroe avers that in order to prevent an adverse workload for the plaintiff, he transferred the work from two ZIP codes to another office, resulting in the plaintiff having the same workload as her counterpart in the other office. The defendant contends that the plaintiff has no evidence that budgetary concerns were a mere pretext for discrimination, since

The workload records show that there was no increase in the plaintiff's workload after Mr. Permenter's transfer.

The plaintiff's response asserts that other personnel transfers could have been made to allow more staffing at her office. However, the Court finds tht this argument fails to rebut the defendant's explanation for the staffing decision. The Court cannot strike down employment decisions which are merely not prudent or not fair; the plaintiff must show that they were made with unlawful discriminatory animus. Damon v. Fleming Supermarkets of Florida, Inc. 196 F. 3d 1354, 1361 (11th Cir. 1999). The plaintiff has not provided any evidence showing that Mr. Monroe's personnel decisions were motivated by discriminatory or retaliatory animus.5

5 The plaintiff's affidavit includes assertions of harassment by Joyce Haley and Tony Harper. (DE 67, 37-40) However, the plaintiff conceded at her deposition that these individuals did not make the challenged personnel assignments. The staffing decisions were made by the circuit administrator, Mr. Monroe, although they may have been subject to the veto of Ms. Haley and Mr. Harper. The plaintiff has now shown that Ms. Haley or Mr. Harper exercised any veto power regarding the filling of Mr. Permenter's position (DE 56, p 117-119)

5. Summary

The plaintiff, while demonstrating a prior protected expression, and minimally establishing causation based on Mr. Monroe's knowledge of her prior lawsuit, completely failed to demonstrate adverse employment action. The evidence is overwhelming that her workload did not increase after Mr. Permenter's transfer. Moreover, the defendant has offered a non-discriminatory explanation for the staffing decisions, which the plaintiff failed to rebut as mere pretext. The Court should grant the defendant's motion for summary judgment.

CONCLUSION

This Court having considered carefully the pleadings, arguments of counsel, and applicable case law, it is hereby

RECOMMENDED that the Court GRANT the defendant's motion for summary judgment.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, for consideration by the Honorable William J. Zloch, Chief United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988) cert denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F. 2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTTED at Fort Lauderdale, Florida, this 20th day of August, 2003.

LURANA S. SNOW
UNITED STATES MAGISTRATE
JUDGE

Copies to: Ms. Faye Wright Simpson
AAG Carol A. Field

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-60236-CIV-ZLOCH

FAYE WRIGHT SIMPSON
Plaintiff,

ORDER

SEP 10 2003

vs.

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
Defendant,

THIS MATTER is before in Court upon the report And Recommendation (DE42) filed herein by United States Magistrate Judge Lurana S. Snow and upon the Objections To the Striking of Incidents 3-7 In The Magistrate Judge's Report And recommendation (DE 45) filed by the Plaintiff, Faye Wright Simpson. The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Plaintiff, Faye Wright Simpson's Objections To The Striking of Incidents 307 In the Magistrate Judge's Report And recommendation (DE45) be and the same is hereby **OVERRULED;** and

2. The Report And Recommendation (DE 42) filed herein by United States Magistrate Judge Lurana S. Snow, be and the same is hereby approved, ratified

adopted by the Court.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County , Florida this 10th day of September, 2003.

WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished
See attached Mailing List

UNITED STTES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 02-60236-CIV-ZLOCH

ORDER

FAYE WRIGHT SIMPSON
Plaintiff,

vs.

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
Defendant,

THIS MATTER is before the Court upon Defendant State of Florida Department of Corrections' Motion to Dismiss Plaintiff's Amended complaint (DE 22), Defendant, State of Florida Department of Corrections' Motion For Summary Judgment (DE 51), the Report And Recommendation (DE 109) filed herein by United States Magistrate Judge Lurana s. Snow, Plaintiff, Faye Wright Simpson's Objections to Magistrate's Report And Recommendation (DE 111) and Defendant, State of Florida Department of Corrections' Objections To Magistrate's Report and Recommendation To Grant Defendant's Motion For Summary Judgment (DE 112). The Court has carefully reviewed said Motions, conducted a de novo review of the entire record herein and is otherwise fully

advised in the premises.

The Court notes that Plaintiff Faye Wright Simpson's (hereinafter "Plaintiff" Amended Complaint (DE 18) contains a single count seeking damages, fees and costs and injunctive relief based on her allegation that the Defendant, State of Florida Department of Corrections (hereinafter " Defendant") retaliated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000 et. Seq. The instant Report and Recommendation (DE 109) addresses Defendant's Motion For Summary Judgment (DE 51).

Under Rule 56 (c) , Fed. R. Civ. P., summary judgment is proper

..... if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 (c) ; see also Eberhardt v. Waters, 901 F. 2d 1578, 1580 (11th Cir 1990). The party seeking summary judgment " always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ' the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Indeed, " the moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F. 2d 604, 608 (11th Cir. 1991); Avirgan v. Hull, 932 F. 2d 1572, 1577 (11th Cir. 1991).

The moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing of an essential element of the case to which the non-moving party has the burden of proof. Celotex Corp., 477 U.S. at 322; Everett v. Napper,833 F. 2d. 1507, 1510 (11th Cir. 1987). The standard for granting summary judgment is the same as the standard for granting a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Appellate courts generally, therefore, will affirm the granting of summary judgment if on any part of the prima facie case there would be insufficient evidence to require submission of the case to a jury. Anderson, 477 U.S. at 252-256; Barnes v. Southwest Forest Indus., Inc., 814 F. 2d 607, 609 (11th Cir. 1987). The

Evidence of the non-movant is to be believed, however and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255; Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Barnes, 814 F. 2d at 609; Norg-Warner Acceptance Corp. v. Davis, 804 F. 2d 1580, 1582 (11th Cir. 1986).

Nevertheless, where the moving party properly supports the motion for summary judgment, " the nonmoving party may not rest upon the mere allegations or denials of its pleadings, but must, through affidavits or as otherwise provied in Fed.R.Civ.P.56, designate specific facts showing that ther is a genuine issue for trial." L.S.T., Inc. v. Crow, 49 F. 3d 679, 684 (11th Cir. 1995)(internal quotations and citations omitted); Eberhardt, 901 F. 2d at 1580.

The burden of proof in Title VII retaliation cases is governed by the framework established in McDonnell-Douglas v. Green, 411 U.S. 792 (1973) ....

The substantive law of this circuit dictates that a plaintiff alleging retaliation must establish a prima facie case by showing : (1) a statutorily protected expression, (2) an adverse employment action, and (3) a causal link

Between the protected activity and the adverse action. Once plaintiff has established a prima facie case of retaliation, the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment action.

Hairston v. Gainesville Sun Pub. Co., 9 F. 3d 913, 919 (11th Cir. 1995) (internal citations and footnote omitted). Thereafter, the burden shifts back to plaintiff to "raise a genuine factual question as to whether (defendant's) stated reason is mere pretext." Id. at 920 (citation omitted). This final burden in the summary judgment context, however, does not require Plaintiff to introduce evidence beyond that offered to establish a prima facie case, see id. at 921, and Plaintiff need not prove that Defendant's stated reason is pretext. Maddow v. Procter & Gamble Co., Inc., 107 F. 3d 846, 851 (11th Cir. 1997)(citing Hairston, 9 F. 3d at 921). Therefore, " the grant of summary judgment, thought appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the ' elusive factual question' of intentional discrimination." Hairston, 9 F. 3d at 921 (citing Texas

Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The Court further notes that Plaintiff is proceeding pro se and that the Eleventh circuit requires that, determining a motion for summary judgment, the Court construe a pro se plaintiff's pleadings more liberally than that of a represented party. See Harris v. Ostrout, 65 F. 3d 912, 915 9 11th Cir. 1995).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows

1. Defendant, State of Florida Department of Corrections' Motion For Summary Judgment (DE 51) be and the same is hereby **DENIED;**

2. Defendant, State of Florida Department of Corrections' Motion to Dismiss Plaintiff's Amended Complaint (DE22) be and the same is hereby **DENIED as moot;** and

3. Defendant, State of Florida Department of Corrections' is hereby **DIRECTED** to file an Answer on or before Friday, September 26, 2003.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 15th day of September, 2003.

WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:

Faye Wright Simpson, Pro Se
4810 NW 21st Street
Coconut Creek, FL 33063

Carol A. Field, Esq.
For Defendant

Hon. Lurana S. Snow
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-13499
Non-Argument Calendar

D.C. Docket No. 02-60236-CW-WJZ

FAYE WRIGHT SIMPSON

Plaintiff-Appellant

versus

FLORIDA DEPARTMENT OF CORRECTIONS

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Florida

(May 19, 2005)

Before EDMONDSON, Chief Judge, BIRCH and
BARKETT Circuit Judges

PER CURIAM

Faye Wright Simpson appeals the district court's orders granting (1) partial summary judgment and (2) judgment as a matter of law in favor of her former employer, the Florida Department of Corrections ("DOC"), in this case alleging retaliation in violation of Title VII, 42, U.S.C § 2000 et seq. No reversible error has been shown: we affirm:

Simpson, an African-American woman who was a correctional probation specialist at the DOC, alleged that her supervisors overburdened her with excessive work after she filed an internal civil rights complaint, a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), and a 1998 employment discrimination lawsuit against the DOC. Simpson asserted that, in early 2001, the DOC instituted office staffing changes that left her as the only specialist in her office. Simpson subsequently asserted in an affidavit that she worked at least five hours unpaid overtime per week for over a year to meet the job obligations caused by the increased workload.

Based on Simpson's allegations of working unpaid overtime, the DOC reported this conduct to the state inspector general's office ("OIG"), which investigated her failure to disclose the alleged overtime on her

attendance and leave reports. The DOC terminated Simpson in August 2003 after the investigation.

The Public Employees Relations Committee ("PERC") held a post-termination hearing. The hearing officer determined that Simpson had not worked the overtime she claimed and thus did not falsify her time sheets. But the hearing officer opined that Simpson therefore had filed a false affidavit alleging she had worked unpaid overtime. The officer also determined that Simpson had refused to answer questions about her job duties and had failed to follow instructions during the investigation interview. The officer concluded that discipline, including termination, was warranted.

Simpson supplemented her complaint to add a claim that the DOC terminated her in retaliation for her engaging in a protected activity. The district court granted summary judgment on the claim of retaliatory termination. The district court determined that Simpson had not rebutted as pretexual the DOC'S proffered reasons for termination: that she had engaged in misconduct by falsifying either her time sheets or her affidavit and that she did not cooperate with the investigation about the time sheet discrepancy. But the district court allowed the claim about retaliatory

increased workload to proceed to jury trial. After the close of Simpson's case, the district court granted the DOC's Fed.R.Civ.P.50 motion for judgment as a matter of law.

Simpson argues that the district court erred in granting the DOC's Rule 50 motion: she contends a jury should have been permitted to decide the degree to which her workload increased after the staffing changes in her office and to decide whether the DOC intentionally increased her workload. But Simpson has not provided us with transcripts of the trial. Federal Rule of Appellate Procedure 10(b) places on the appellant the burden of ensuring that the record on appeal-- including the appropriate transcripts-- is provided to this Court. See Fed.R. App.P 10(b); Loren v. Sasser, 309 F.3d 1296, 1304 (11th Cir. 2002)(writing that a pro-se litigant "must provide trial transcripts in the appellate record to enable this court to review challenges to sufficiency of the evidence"),cert. denied, 123 S. Ct. 1589, 2219 (2003)
And without transcripts of the trial, we cannot review whether the district court erred in granting the DOC's rule 50 motion.1

1. Simpson has provided only the 18-page transcript of the oral argument on the Rule 50 motion. But she has not submitted the transcripts showing the testimony and evidence presented at trial, on which the district court based its ruling.

So, due to Simpson's failure to provide the necessary trial transcripts, we must affirm the district court's grant of the DOC's Rule 50 motion on her claim of retaliatory increased workload. See Loren, 309 F.3d at 1304. 2

Simpson also argues that the district court erred in granting summary judgment on her retaliatory termination claim. She asserts (1) that she established a prima facie case of retaliation and (2) that she rebutted as pretexual the DOC's reasons for her termination by presenting affidavits and testimony showing she actually was terminated for filing EEOC charges and a lawsuit, not for filing false timesheets or a false affidavit.

We review a district court's grant of summary judgment de novo; and we view the evidence in the light most favorable to the party opposing the motion. Kelley v. Hicks, 400 F.3d 1282 (11th Cir. 2005) Summary judgment is appropriate when "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

2 Simpson suggests that the magistrate judge should not have denied her motion to compel production of caseload printouts for other specialists: these printouts allegedly would have substantiated her claim. The magistrate judge abused no discretion in denying this motion: the magistrate determined that the motion was

untimely and that the DOC attested that no such documents were in its possession. See Hinson v. Clinch County, Ga. Bd of Educ., 231 F.3d 821, 826(11th Cir. 2000) (no abuse of discretion for district court to deny motion to compel production due to plaintiff's delay in filing motion).

To evaluate claims of Title VII retaliation based on circumstantial, rather than direct, evidence of discrimination, we use the burden-shifting framework in McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973). See Rojas v. Florida,
285 F. 3d 1339, 1342 (11th Cir. 2002). Simpson must establish a prima facie case of retaliation. The DOC then must offer a legitimate, nondiscriminatory reason for its employment acts/ If the DOC successfully rebuts the presumption, the burden shifts back to Simpson to discredit the proffered nondiscriminatory reason as pretexual. See id.

We assume without deciding that Simpson can establish a prima facie case of retaliation. And the DOC offered legitimate, nondiscriminatory reasons for termination: her submission of false time sheets and her later failure to cooperate with the OIG investigation. The DOC circuit administrator underscored the seriousness of a claim of unrecorded overtime: this exposed the DOC to liability for violations of the Fair Labor Standards Act. That the PERC determined that Simpson had not worked the alleged overtime does not

save Simpson from summary judgment: a necessary inconsistency exists between Simpson's affidavit claiming she worked overtime, and the time sheets reflecting no overtime. 3

3 The DOC has submitted supplemental authority: the state court of appeals' affirmance of PERC decision upholding Simpson's termination. The DOC contends that Simpson is collaterally estopped from arguing that she did not commit the violations that led to her termination. But the district court already had considered the PERC decision in determining that nondiscriminatory reasons existed for Simpson's termination. And even though the state court decided that cause existed for Simpson's termination, this does not preclude Simpson from arguing that her termination "was the product of...retaliation." Manniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

Simpson has not rebutted as pretexual the DOC's reasons for her termination. She points to the affidavits of a coworker, Donald Campbell, and a supervisor, Larry Sullenger, that the DOC "made it known" that she would be terminated because she filed the EEOC charges and lawsuits. Sullenger's affidavit contains nothing more than conclusory allegations that Simpson was terminated for an illegal reason. See Leigh v. Warner Bros., Inc., 212 F. 3d 1210, 1217 (11th Cir. 2000) (writing that conclusory allegations in affidavit are insufficient to defeat motion for summary judgment). Campbell indicated that in an October 2000 telephone conversations with Stephanie Curd, an assistant attorney general for the State of Florida, Curd state DOC administrators "hate(d)" Simpson for filing lawsuits and that these administrators said eventually they would fire Simpson. But Simpson was not fired until nearly three years after this conversation. And Curd's comments indicated nothing more than her own opinion of the DOC's attitude toward Simpson: these comments do not address the DOC's proffered reasons for her termination. 4

4 We do not consider Simpson's contention that she established pretext because the DOC failed to terminate a specialist who committed, and was sentenced to probation for, a violent sexual battery. Simpson presented this evidence to the district court only after her trial: it was not before the court when the court ruled on the summary judgment motion. See Clinkscales v. Chevron U.S.A.,Inc., 831 F.2d 1565, 1570 (11th Cir. 1987) (stating that

appellate court does not consider evidence not part of the record properly before district court in ruling on summary judgment motion). Simpson also refers to trial testimony that allegedly supports her argument on pretext. But we do not consider this evidence: it was not before the district court when it ruled on the DOC's summary judgment motion, and in any event she has not provided us with trial transcripts.

In sum, Simpson has not met the DOC's legitimate, nondiscriminatory reasons for her termination "head on:" and rebutted them. Wislon v. B/E Aerospace, Inc., 376 F. 3d 1079, 1088 (11th Cir. 2004) (Title VII discrimination case). The district court properly granted summary judgment in favor of the DOC on Simpson's retaliatory termination claim.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-13499-BB

FILED
AUG 17 2005

FAYE WRIGHT SIMPSON,

Plaintiff-Appellant

versus

FLORIDA DEPARTMENT OF CORRECTIONS

Defendant-Appellee

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

JULY TERM 2004

FOURTH DISTRICT

FAYE WRIGHT-SIMPSON

Appellant,

v.

DEPARTMENT OF CORRECTIONS

Appellee

CASE NO. 4DO3-5034

Opinion filed December 29, 2004

Appeal from the State of Florida, Public Employees Relations Commission, L.T. Case No. CS-2003-219

Michael Braverman of Michael Braverman, P.A. Fort Lauderdale, for appellant.

Gary L. Grant, Assistant General Counsel, Tallahassee, for appellee.

SHAHOOD,J.,

We affirm the Public Employees Relations Commission's (PERC) final order upholding the termination of appellant, Faye Wright-Simpson, from her employment with the Department of Corrections (Department).

Prior to her dismissal from the Department, Wright-Simpson filed a discrimination lawsuit against the Department in federal court. In her complaint, Wright-Simpson alleged that the Department retaliated against her in violation of Title VII for her participation in a prior discrimination case.

The Department moved for summary judgment arguing that Wright-Simpson's federal case should be dismissed because she had not suffered any adverse employment action and that despite her assertions of an abnormally high caseload, there was no evidence to suggest that she had to work extra hours to keep up her increased workload.

In response, Wright-Simpson filed a rebuttal affidavit claiming that she had an excessive number of high risk cases assigned to her and that despite her requests for assistance, the Department refused to assign another

another Specialist Wright-Simpson claimed that she had to work an extra five hours per week in overtime without pay in order to maintain her increased caseload. Wright-Simpson maintained that she was owed in excess of $10, 000 in salary for overtime hours during the time period from March 2001 to April 2002.

The Department stated that this was the first time Wright-Simpson ever indicated that she was required to work overtime for which she had not been paid. Further, a review of her timesheets, which had been certified by Wright-Simpson to be true and correct, did not reflect any overtime. As a result the Department commenced an investigation and stated in an affidavit that:

" If, as Ms. Wright-Simpson now contends in her sworn affidavit, that she actually worked an average of five hours overtime per week which is not reflected on her signed and certified time sheets, that would mean that her time sheets are not "true and correct" as she personally certified to her employer when she submitted them. This would be a violation of DOC policy and procedure. Alternatively, if Ms. Wright-Simpson's time records are "true and correct" as she certified to her employer when she submitted them, then her sworn affidavit submitted in this civil lawsuit would be inaccurate and untrue."

The Department asserted that Wright-Simpson's caseload was not significantly higher than any other comparable officer in the district in which she worked and that her timesheets did not reflect any overtime worked by her during the relevant time period. The Director of human resources for the Department affirmed that Correctional Probation Officer Specialists were not allowed to work more than forty hours per week without requesting and getting paid for overtime. If an officer could not complete her work in a timely manner and needed overtime in order to do so, the officer was required to discuss the situation with a supervisor.

Following the results of its investigation, the Department notified Wright-Simpson that she was being dismissed from her position as a correctional probation specialist. The Department's final action letter advised Wright-Simpson that she was being discharged for refusing to answer questions specifically related to her official duties. negligence, falsification of forms or records, conduct unbecoming a public employee, willful violation of rules, regulations, directives or policy statements, giving false testimony and failure to follow oral or written instruction.1. As the basis for dismissal, the Department stated:

1 The letter further sets forth the various Department rules which were violated by Wright-Simpson's conduct.

"Specifically, on or about April 1, 2003, Human Resource Analyst Margaret Chrisawn discovered that you had claimed in an Affidavit submitted to the United States District Court regarding personal litigation that you had worked an average of five (5) hours per week of overtime without being paid during the period from March 2001 to April 2002. However, a review of your Department of Corrections Attendance and Leave reports for this period disclosed that you did not report and/or work the claimed overtime, even though said reports contained your signature certifying that they represented a true and correct record of your hours worked. As a result, Ms. Chrisawn reported this information to the Office of the Inspector general and an investigation was initiated. On May 1, 2003, Correctional Officer Senior Paul Bowdre of the Office of the Inspector General attempted to conduct an interview with you regarding this matter. However, you repeatedly refused to answer questions posed to you which were directly related to your submission of the referenced Attendance and Leave reports and working overtime, citing your pending litigation and the advice of an unidentified attorney as the reasons. The basis for these charges is contained in investigation No. 03-31079 conducted by Inspector Bowdre, a copy of which was already provided to you with my letter of

June 18, 2003. Following an evidentiary hearing, the hearing officer found that Wright-Simpson did not report her alleged overtime on her timesheets, that there was no evidence that she was unable to handle her caseload, that she never requested authorization for overtime, and that she did not inform her supervisors that she was working overtime in order to complete her work. The hearing officer concluded that Wright-Simpson did not work overtime as she alleged and that she submitted true and correct timesheets during the relevant period. Thus, the Department did not prove that Wright-Simpson falsified her timesheets. The hearing officer then went on to conclude that the Department "did not charge her with making any other false statement."

The Department filed the following exception to the hearing officer's recommended order:

The hearing officer finds that Ms. Simpson did not in fact work overtime and, thus her timesheets had not been falsified. This finding represents a de facto finding that Simpson falsified her affidavit in her federal case wherein she alleged that the Department owed her $10,000 because she had worked overtime of five hours per week for over one year without being paid. Although the Department must respectfully except to the conclusion that Simpson had not been charged with any violation relative to her federal filings and thus, cause had not been shown to discipline her for this

false filing. The Department submits the final action letter reasonably implies that the charges are that Simpson either perjured herself by filing a false affidavit in the federal court or she falsified her timesheets.

This entire case arose because of the inconsistency between the timesheets and the federal filing. This inconsistency was clearly set forth in the final action letter. The Department should not be penalized because the hearing officer chose to believe that falsification of the federal filing had occurred rather than falsification of the timesheets. It should also be noted that the presentation of the evidence at the hearing and the proposed recommended order submitted by the Department are all consistent with the either/or scenario spelled out above. There was no surprise or disadvantage to the Employee regarding the Department's contention that either perjury in federal court or falsification of timesheets had occurred. Clearly, the charge of conduct unbecoming and falsification of forms are both supported by the findings of fact made by the hearing officer.

PERC remanded the matter for the hearing officer to consider that portion of the final action letter which alleged that Wright-Simpson falsified her affidavit filed in federal court which stated that she worked overtime without being paid from March 2001 to April 2002.

In a supplemental recommended order, the hearing officer again concluded that because Wright-Simpson submitted true and correct timesheets between the relevant period which did not claim overtime, the department did not have cause to discipline her for falsifying her timesheets. However, the hearing officer concluded that because Wright-Simpson did not work overtime during the relevant period, she intentionally filed a false affidavit in federal court in order to show that she incurred economic damages in her Title VII claim. Accordingly, the Department had cause to discipline Wright-Simpson for conduct unbecoming a public employee.

Wright-Simpson filed exceptions to the recommended orders, which PERC denied. PERC upheld the hearing officer's findings and conclusions and dismissed Wright-Simpson's appeal.

We reject Wright-Simpson's claim that the final action letter issued by the Department failed to apprise her that she was being charged with violations of rules and regulations relative to the filing of a false affidavit in federal court.

In determining whether an employee has been reasonably informed of the charges against him by the language contained in a predetermination and final action letter, PERC does not require the strict, fine precision required of pleadings if courts; rather, the standard is whether the letters are clear enough to

apprise an employee of the proposed action and the facts upon which it hinges. See Schindler v. Dep't of Children & Families, 15 FCSR 454 (2000): Shuler v. Dep't of Health & Rehabilitative Servs., 3 FCSR ¶ 051 (1988), affirmed, 538 So. 2d 1256 (Fla. 1st DCA 1989). Notices of this sort in administrative proceedings are not required to meet technical niceties or formal exactness as required of pleadings in the courts. See Smith v. Dep't of Health & Rehabilitative Servs., 555 So. 2d 1254, 1256 (Fla. 3d DCA 1989) (PERC correctly rejected the hearing officer's legal conclusion that the charge against Smith was legally insufficient. The notice filed herein was specific enough to inform the employee with reasonable certainty of the nature of the charges against her).

In the final action letter, Wright-Simpson was notified that she was being dismissed for refusing to answer questions specifically related to her official duties, negligence, falsification of forms or records, conduct unbecoming a public employee, willful violation of rules, regulations, directives or policy statements, giving false testimony and failure to follow oral or written instructions. The letter highlighted that an investigation was initiated by the Inspector General after it was discovered that Wright-Simpson had claimed in an affidavit filed in federal court that she worked five hours per week in overtime without

being paid during the period of March 2001 through April 2002. A review of Wright-Simpson's attendance and leave reports reflected no overtime claimed by Wright-Simpson and was attested to by Wright-Simpson to by Wright-Simpson to be true and correct records of her hours worked.

Wright-Simpson was charged with violating "Department of Corrections rules, Chapter 33-208.002(1)., (4)(a), (7), (11), (13), (20), Chapter 33-208.003(13) (21)(22) (24),(28),(32), F.A.C., and the Rules of the Department of Management Services, Personnel Management System, Chapter 60L-36.005(3)(b), (e),(f),(g)."

Department of Corrections rules 33-208.002, Florida Administrative Code, provides in part that "[t]"he Department of Corrections required all employees to familiarize themselves with all rules and regulations pertaining to their positions and duties, and that employees abide by these rules and regulations." The applicable rules of conduct included that: no employee refuse to truthfully answer questions specifically relating to the performance of his or her official duties; no employee be insubordinate, neglectful, or unwilling to follow lawful orders or perform officially designated duties; no employee falsify reports or records; and no

employee knowingly submit inaccurate or untruthful information for or on any Department of Corrections record, report or document. Fla Admin. Code R. 33-208.002(1),(4)(a), (7),(11), (130, (20). Department of Management Services, Personnel Management System Rule 60L-36.005, Florida Administrative Code, provided that permanent career service employees may be suspended or dismissed for cause for violations which include: negligence; violation of law or agency rules; conduct unbecoming a public employee; and misconduct. Fla. Admin. Code R. 60L-36.005 (b),(e),(f),(g).

From the contents of the letter and the above rule violations, Wright-Simpson was clearly placed on notice that she either falsified her timesheets or the affidavit she filed in federal court, that such inconsistency resulted in an investigation commenced by the Department and that she failed to answer questions relating to her work attendance. Accordingly, Wright-Simpson had notice apprising her of the action against her and the facts upon which the action hinged.

Clearly, the action taken against Wright-Simpson was in keeping with the hearing officer's conclusion in her supplemental recommended order that the Department proved by a preponderance of the evidence that it had cause to discipline Wight-Simpson for conduct unbecoming a public employee. Accordingly, PERC did not abuse its discretion in upholding Wright-Simpson's dismissal.

AFFIRMED

FARMER, C.J., and GREEN, CHARLES M., Associate Judge, concur.

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING

Supreme Court of Florida

Thursday, September 22, 2005

FAYE WRIGHT-SIMPSON v. FLORIDA DEPARTMENT OF CORRECTIONS

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed it necessary to reflect jursidiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jursidiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P.9 330(d).

ANSTEAD, LEWIS, QUINCE. CANTERO and BELL, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

mc:

FAYE WRIGHT-SIMPSON
GARY LAVON GRANT
HON. MARILYN BEUTTENMULLER, CLERK
JOEY D. RIX